Imogen Saunders. ***General Principles as a Source of International Law: Art 38(1)(c) of the Statute of the International Court of Justice***. Oxford: Hart Publishing, 2021. Pp. 285. US$121.50. ISBN: 978-1-50993-606-9.

1 Introduction

The discourse on general principles of law revolves around vexed controversies, regarding their nature, functions and even their very status as a formal source, despite their inclusion in Article 38(1)(c) common to the Statutes of the Permanent Court of International Justice (PCIJ)[1] and the International Court of Justice (ICJ).[2] Indeed, their identification and application are still hindered by inconsistencies and the lack of rigour often characteristic of several quarters of scholarly and adjudicative discourse.[3] This state of disarray has recently prompted efforts to shed light on those controversies, including most notably the United Nations (UN) International Law Commission's (ILC) ongoing work on general principles of law.[4]

Imogen Saunders's monograph puts forward an analytical 'framework' to address most of those unresolved issues, based on a rigorous survey of literature and decisions of international courts and tribunals, with a particular focus on the various separate and dissenting opinions relying more often than not, as Saunders argues, on Article 38(1)(c) common to the PCIJ and ICJ Statutes. In fact, in contrast to received wisdom, one of Saunders's major claims is that the 'under-utilisation of General Principles … is often overstated' since 'the source has been used or discussed in over 80 PCIJ and ICJ judgments' (at 2) and relevant individual opinions and declarations, among other international decisions and pronouncements.

Saunders's concluding plea – 'not arguing for an *extension* of General Principles but merely full utilisation of them as a source of law' (at 274, emphasis in original), is plausible and well argued. Saunders's attempts at rigorously upholding the distinctiveness of general principles of law (at 136) are also very much welcome. Tellingly, Saunders contests the statement in *Brownlie's Principles of Public International Law* that, since '"general principles of international law" may … refer to … certain logical propositions underlying judicial reasoning on the basis of existing international law … a rigid categorization of sources is inappropriate'.[5] Indeed, Saunders argues, while this statement does not conflate those 'logical propositions' with general principles of law, 'it is not that a rigid categorisation of sources is inappropriate, but that *the*

[1] Statute of the Permanent Court of International Justice 1920, 6 LNTS 389.

[2] Statute of the International Court of Justice (ICJ Statute) 1945, 1 UNTS 993.

[3] As Imogen Saunders aptly notes, various schools of thought have not rigorously addressed issues arising in connection with the identification of general principles of law – namely, among others, to what extent judicial discretion might be allowed; whether only principles of domestic law should be relied on; and whether a 'content-based approach to validity' is necessarily required by comparative methodologies often resorted to (at 49, 89–90).

[4] International Law Commission (ILC), Third Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur, UN Doc. A/CN.4/753, 18 April 2022, at 11, para. 9.

[5] J. Crawford (ed.), *Brownlie's Principles of Public International Law* (9th edn, 2019), at 34.

need for precision of terminology is paramount' (at 269; emphasis added). Furthermore, Saunders's analysis strikes a balance between the seemingly inclusive positivist perspective underpinning the monograph and competing jurisprudential perspectives, notably critical approaches to international law. In fact, Saunders echoes critiques of traditional approaches to general principles of law due to their lack of representativeness, mainly voiced by scholars defending critical approaches to international law, and acknowledges 'the need to focus on diverse legal systems' (at 241) to effectively address those critiques. Moreover, Saunders appositely claims that the ascertainment of general principles of law can be empowered by technological development (at 4), due to the 'increasing digitisation of data and global instantaneous access … via the Internet' (at 264–265). Notwithstanding the merits of Saunders's engagement with the potential impact of technological development on the ascertainment of general principles of law, it is surprising that, given how recent the monograph is, Saunders makes no mention of 'artificial intelligence' (AI) nor of AI's potential impact on the ascertainment of general principles of law in particular. Indeed, AI in the form of increasingly powerful 'large language models' (LLMs) has most recently captured the public's attention across the world, due to the capacities to analyse and generate text and images astonishingly deployed by LLMs. Hence, Saunders's omission of AI is somewhat staggering.

Saunders's survey of materials is also valuable in that it critically engages with adjudicative discourse on 'general principles of law' alongside scholarly commentary and does so by deliberately placing greater emphasis on international decisions in sharp contrast to existing scholarship, which, according to Saunders, has heretofore tended to solely focus on academic works, thus neglecting relevant international decisions (at 3). More importantly, Saunders's analysis persuasively shows that several international decisions have been uncritically relied on by several writers to support their ascertainment of well-established general principles of law, despite ultimately proving irrelevant to those principles (see, for example, Saunders's analysis at 56–58).

2 Analysis

The monograph's structure, however, still largely reflects that of a doctoral dissertation: leaving aside introductory and concluding parts, setting out the dissertation's conceptual framework and major findings (chapters 1 and 7–9), the materials surveyed are concentrated in a single part, artificially divided into five chapters (chapters 2–6) – a division meant 'to give the reader a break' from a long line of cases. Indeed, Saunders rationalizes this 'pure necessity to give the reader a break' by referring, in a way that clearly seems an afterthought, to two 'time periods … in the use of the Court' – namely, 'post-World War II cases' and 'post-Cold War cases' (at 91). Instead, a redistribution of the materials along the lines of Saunders's proposed 'tetrahedral' model, considering the 'function', 'type' and 'legitimacy' of the general principles of law surveyed, as opposed to discussing them in chronologically linear fashion, could have significantly enhanced the monograph's effectiveness.

Furthermore, its conceptual framework could have been better articulated. Notably, certain key concepts are formulated in rather opaque terms. For instance, the notion of 'categoricism (*sic*)' lacks sufficient, if any, traction in the literature. Yet it features alongside well-known terms such as 'comparativism' and 'discretion' (at 222) as Saunders's major analytical frameworks. Saunders discusses the notion of 'categoricism' in contradistinction to that of 'comparativism': while '[c]omparativism requires a horizontal generality, assessed laterally across legal systems (usually domestic, but not always)', arguably, 'categoricism tends to a natural law methodology, as the validity of principles found in this manner often relates to their content' (at x). In this latter regard, while Saunders further states that '[c]atagoricism (*sic*) … can be considered as a more vertical generality, looking to abstractions of principles rather than lateral commonality', it is the case that '[t]he exact methodology of categoricism is unclear' (at 15–16). In any case, insofar as 'categoricism (*sic*)', as represented by Saunders, is largely coextensive with natural law-inspired conceptions of law (at 224), terms such as 'natural law-based' conceptions of international law (as noted in Saunders's discussion of Judge Kotaro Tanaka's dissenting opinion in *South-West Africa* (at 123))[6] or 'natural law dimensions' of international law (at 224) may have more clearly conveyed the ideas at hand. Indeed, Saunders's criticism of 'the categoricist (*sic*) approach' to the appropriateness of general principles of law as being 'inherently personal' (at 225) echoes criticisms of natural law-inspired thinking. Likewise, the word 'chthonic' (at 230) raises similar issues; suffice it to say that more well-established terms than 'chthonic', such as 'local', 'oral'[7] or 'indigenous'[8] legal traditions, could have more aptly conveyed the notion of such legal systems.

Saunders's direct reliance on Article 38(1)(c) of the ICJ Statute is an important, and largely warranted, feature of the monograph. Indeed, one of the merits of Saunders's approach is that it forcefully objects to attempts at justifying 'judicial legislative activity' through the invocation of general principles of law (at 227). Those objections are not only principled but also nuanced since Saunders considers it 'correct' to acknowledge that 'judges have a "creative" function in the context of rules-based discretion in relation to General Principles' and contests extensions of such 'rules-based discretion' to forms of 'more guided discretion, or even to the extreme of judicial legislation' (at 227). There are, however, certain limitations to the extent to which Article 38 can be relied on – notably, the related PCIJ Statute's preparatory work. For instance, Saunders criticizes Robert Kolb's suggestion that 'judges may *reject* a certain approach in favour of a General Principle' on grounds that, among others, such a suggestion would 'directly *contradict* the work of the Advisory Committee of Jurists in ensuring that judges would not exercise wide discretion in applying General Principles' (at 226; emphasis

[6] *South-West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa) (Second Phase) (1966)*, Judgment, 18 July 1966, ICJ Reports (1966) 6, Dissenting Opinion of Judge Tanaka, 250, at 296.

[7] S. Ragone and G. Smorto, *Comparative Law: A Very Short Introduction* (2023), at 38.

[8] In choosing not to call those legal systems 'indigenous', Saunders uncritically accepts Patrick Glenn's 'reservations' to use the adjective 'indigenous' (at 243, n. 22), without elaborating on why such an adjective should be avoided, despite its widespread usage in comparative law literature and, more importantly, in major international instruments – most prominently, the United Nations Declaration on the Rights of Indigenous Peoples, UN Doc. A/61/49, 13 September 2007.

added). Saunders's view assumes not only that the PCIJ's preparatory work, in and of itself, has some legally binding effect but also, more fundamentally, that Article 38(1)(c) contains a general 'rule of recognition' of general principles of law binding *qua* treaty outside the context of PCIJ/ICJ proceedings. While Saunders's assumption is valid insofar as applicable law in PCIJ/ICJ proceedings is concerned, Saunders's argument refers to general principles of law universally.[9]

The remainder of this review examines the merits and limitations of Saunders's 'tetrahedral' model and its related conceptual framework of general principles of law. Saunders's proposed 'model' seeks to fill a gap since, in Saunders's opinion, '[p]aradoxically, both the under-utilisation and over-utilisation of General Principles stem from the same foundation: the lack of a clear and accepted *model* of General Principles' (at 3; emphasis added).

Saunders's 'tetrahedral' model comprises four elements, namely 'type', 'function', 'methodology' and 'jurisprudential legitimacy' (at 5). While the term 'tetrahedral', unlike other terminology employed by Saunders, is not opaque, it risks being perceived as a mere rhetorical device, devoid of any particular conceptual value, insofar as there is no particular interaction between the four elements having any geometrical qualities. Also, even assuming a geometrical analogy is apposite, portraying the 'jurisprudential legitimacy' axis as the only one 'touching and informing all other aspects', covered by the other axes (at 5), fails to convey other significant interactions involved, as discussed below.

'Type' concerns the categories into which general principles of law can be subsumed. As Saunders puts it, type 'asks what kind of content can become a General Principle'. Saunders's definition of 'type' requires considering 'two preliminary questions …: first, the significance of the distinction drawn between rules and principles; and, second, whether General Principles are limited to certain types of content' (at 12). However, general principles of law involve a wider taxonomical spectrum other than the rule/principle interface.

General principles of law sit at the intersection of various, often overlapping, classificatory distinctions, in addition to that between principles and rules, such as general (*lex generalis*) or particular (*lex specialis*) (appertaining, in turn, to general or particular 'regimes' of international law);[10] principal or subsidiary;[11] substantive or

[9] In this sense, Saunders's views, like other scholars regarding Article 38 of the ICJ Statute as authoritative, 'fail to indicate whether it is so *qua* treaty or *qua* statement of a separate rule, including any' rules of customary international law. *Cf*. Mejía-Lemos, 'Custom and the Regulation of "the Sources of International Law"', in P. Merkouris, J. Kammerhofer and N. Arajärvi (eds), *The Theory, Practice, and Interpretation of Customary International Law* (2022) 137, at 154.

[10] There is a vast body of literature on each of these interfaces, but, for the purposes of this review (and due to the paucity of space this kind of review entails), references in the study on fragmentation conducted by the ILC mostly suffice. ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission, finalized by Mr. Martti Koskenniemi, UN Doc. A/CN.4/L.682 and Add.1, 13 April 2006, at 19, 24, paras 56, 85, respectively (noting that the maxim *lex specialis derogat legi generali* provides 'that special law derogates from general law' and, in particular, 'that the body of customary law has primacy over the general principles of law under Article 38, paragraph 1 (c), of the Statute of the International Court of Justice').

[11] *Ibid.*, at 22, para. 75 (referring to the role as 'subsidiary means' of the *lex specialis* maxim).

procedural;[12] primary or secondary;[13] systemic or sub-systemic;[14] written (*lex scripta*) or unwritten (*lex tradita*);[15] 'hard' or 'soft';[16] public or private;[17] international or internal (of interstate, institutional or supranational order);[18] state or non-state (within a-/intra-/sub-/trans-national spheres);[19] positive or natural;[20] and desired (*lex ferenda*) or existing (*lex lata*).[21]

While some of these distinctions are integrated into Saunders's analysis, other interfaces are not fully reflected in that analysis, thus restricting the monograph's potential for making more consequential contributions, as succinctly argued below.

In terms of the preliminary distinction between principles and rules, Saunders cautions that the failure to apply this distinction often leads to misidentifications of general principles of law, 'drawn not from the domestic forum but rather as a logical deduction from the legal system itself' (at 145). While this conclusion seems apposite, Saunders's concept of the generality of a principle shows that the distinction between principle and rule is not so clear as to warrant the above rather categorical finding.

Turning to the international/internal interface, an important issue concerns the propriety of relying on international, rather than domestic, materials. Saunders rightly questions the tendency among international courts and tribunals towards ascertaining '"general" principles … drawn from international jurisprudence' by aptly observing that, '[i]f this is a true use of Article 38(1)(c), it suggests a non-comparativist methodology *using international judgments as the source of the norm*' (at 147; emphasis added). This is an important area for the ascertainment of general international law, whether customary or in the form of general principles of law, as observed below.

Notably, in this vein, one aspect worthy of further research concerns the intersection between the international/internal interface and the primary/secondary law distinction. Unlike some domestic legal systems, vesting in domestic courts law-making

[12] *Ibid.*, at 14, 43, paras 28, 188–189, respectively (noting that 'regime failure' comprises 'substantive failure' and 'procedural failure').

[13] *Ibid.*, at 13, para. 27 (discussing the primary/secondary interface generally).

[14] *Ibid.*, at 32, para. 128 (referring to '"systems" or "subsystems"').

[15] Shany, 'Sources and the Enforcement of International Law: What Norms Do International Law-Enforcement Bodies Actually Invoke?', in S. Besson and J. d'Aspremont (eds), *The Oxford Handbook on the Sources of International Law* (2017) 789, at 808 (arguing that 'the prioritization of judgments and resolutions over primary sources, such as customary international law and general principles of law', may be due to 'the greater pull of *lex scripta* – written norms – over the more ambiguous *lex tradita*').

[16] ILC, *supra* note 4, at 100, para. 490 (referring to 'questions about "soft law", as a special type of law').

[17] *Ibid.*, at 101–102, para. 499(d) (referring to '[t]he role of general (public) international law in regimes' and, in particular, to '[t]he relations of public and private law … within such regimes').

[18] *Ibid.*, at 49, para. 218 (referring to 'supranational' aspects of European Union law).

[19] *Ibid.*, at 98, para. 481 (referring to the fact that '[n]ational laws seem insufficient owing to the transnational nature of the networks' as '[o]ne aspect of globalization').

[20] *Ibid.*, at 69, para. 326 (referring to 'the role of natural law or political justice in international law').

[21] *Ibid.*, at 56, para. 260 (referring to the notion of *lex lata*); Mejía-Lemos, 'The Customary Status of the Articles on Responsibility of International Organizations: A Critical Assessment of Its Scholarly Treatment', in A. Berkes, R. Collins and R. Deplano (eds), *Reassessing the Articles on the Responsibility of International Organizations: From Theory to Practice* (2024) 35, at 38 (distinguishing between '*lex lata consuetudinaria*' and '*lex ferenda consuetudinaria*').

powers, international courts and tribunals have consent-based, most often ad hoc, mandates and lack law-making powers.[22] Hence, any secondary rules that international courts and tribunals may develop in the exercise of their dispute settlement mandates are bereft of the formal legal status the secondary rules developed by their domestic counterparts have within the respective domestic legal systems. Saunders tangentially examines this issue, while commenting on Vaughan Lowe's notion of 'interstitial norms' – that is, those 'not generated by the same processes as the traditional "primary" norms' but that 'simply "emerge" from within the international legal system' (at 158). For Saunders, '[w]hile such interstitial norms may be able to be justified on the basis of General Principles, there is no requirement to do so' (at 158). If Saunders strictly adheres to the general regime on sources of law and seeks to consistently account for 'the behaviour of the *primary actors*' (at 3; emphasis added), either custom or general principles of law must be relied on, based on properly substantiated state general practice and acceptance or recognition as law thereof, respectively, to ground such secondary general rules or general principles of law. Importantly, this could have also enhanced Saunders's stance on the sub-set of secondary rules on the formation and identification of general principles of law.

As for the substantive/procedural interface, Saunders concludes that the ICJ's practice of identifying general principles of law 'is not limited to procedural norms – they include substantive international law norms' as well (at 136). As discussed below, the fact that a principle can create rights and obligations is a key factor in determining whether it has substantive, rather than procedural, legal effects, a matter concerning a principle's 'function'.

'Function', according to Saunders, concerns 'the role that General Principles play' (at 5), and, in turn, Saunders portrays that role as concerning whether the source 'gives rise to binding norms of international law' or not (at 8). Yet Saunders's emphasis on function as simply a matter of 'bindingness' fails to provide a more nuanced description of the various roles that general principles of law can play. These roles, according to the ILC's special rapporteur on general principles of law, may encompass a law-making role – notably, in a 'gap-filling' capacity – and a role as an '*independent basis* of rights and obligations',[23] i.e. directly and independently of any concrete rule subsumable under the respective general principle of law. While the latter role as (a concrete) source of obligation, and not only as (an abstract) source of law, is not contingent on the type of norm embodied in a general principle of law, such a link is made evident by the ILC special rapporteur's reference to '*[s]ubstantive* rights or obligations based on general principles of law'.[24] Yet Saunders appears to neglect the distinction

[22] Mejía-Lemos, 'The Identification of Customary International Law and International Investment Law and Arbitration: State Practice in Connection with Investor-State Proceedings', in P. Merkouris *et al.* (eds), *Custom and Its Interpretation in International Investment Law* (2024) 46, at 46–49.

[23] ILC, *supra* note 4, at 39, para. 108 (emphasis added).

[24] *Ibid.*, at 40, para. 112 (emphasis added) (noting they 'have sometimes been invoked or applied in practice, in the absence of rules of conventional or customary international law regulating a specific legal issue').

between source of law and source of obligation despite having touched on it in the analysis of judicial materials. For instance, Saunders refers to 'rights and obligations' in passing, noting that Judge Stephen Schwebel, in his dissenting opinion in *Nicaragua*, 'refers to "general principles of law" in relation to rights and obligations, but there is no further link to Article 38(1)(c) here' (at 134).

'Methodology' and 'jurisprudential legitimacy' are more closely interrelated than Saunders suggests. A jurisprudential perspective may remain distinct from a law-identification methodology, yet the operation of the latter necessarily instantiates the former.[25] In fact, while Saunders seeks to separate the two aspects, which seems a sensible choice, Saunders's own analysis of the surveyed international materials shows that the two elements tend to coalesce. For instance, Saunders posits that 'not every municipal law analogy by the ICJ or its judges can be taken as a use of Article 38(1)(c)' (at 124). And, in relation to Judge Fouad Ammoun's approach to general principles of law, Saunders notes that 'the rule of recognition remains the comparative study of the domestic laws of states, and hence morality is linked to, but not decisive of, validity' (at 126). More generally, and in contradistinction to Judge Ammoun's approach, Saunders observes a paradoxical tendency among ICJ judges towards regarding general principles of law as being 'capable of embracing both rules of international law derived from a comparative study of municipal systems *and* overarching fundamental principles conferred validity and force by the content of the principle itself' (at 137, emphasis in original). While Saunders's criticism accurately shows that formal and content-based methodologies for determining the legal status of general principles of law are incompatible insofar as the former do not rely on the content of principles, whereas the latter do, it still exemplifies that those methodologies largely instantiate their underlying jurisprudential approaches – namely, those of positivism and natural law.

In particular, there are some valuable distinctions elaborating on the 'jurisprudential legitimacy' axis that, as noted above, have implications in terms of the 'methodological' axis. Notably, Saunders's elucidation of the concept of generality through the distinction between 'vertical' and 'horizontal' generality has some explanatory value. Saunders concludes the analysis of 'generality' by observing that a principle's 'legitimising generality is horizontal: vertical generality is a consequence of (or a reason for) horizontal generality but is in itself not a requirement to found a General Principle' (at 221).

However, despite the potential explanatory value of the 'vertical'/'horizontal' generality distinction, its application by Saunders is liable to some criticism in some important regards. In order to more fully understand the potential value and pitfalls involved in this distinction, it is worth analysing it, as elaborated by Saunders.

[25] Besson and d'Aspremont, 'The Sources of International Law: An Introduction', in S. Besson and J. d'Aspremont (eds), *supra* note 15, at 15 (noting that 'there is a wide variety of conceptions and perspectives from which one may understand, assess, debate, or use the sources of international law').

Verticality, as understood by Saunders, involves a form of '*vertical generality*, looking to abstractions of principles rather than lateral commonality' (at 16; emphasis added). As such, Saunders adds, seemingly agreeing with Rudolf Shlesinger's views, 'vertical generality cannot be assessed across many systems' (at 221).[26] In this vein, and to the extent that '[a] requirement of vertical generality goes to "the very character of the legal proposition that is at stake", and thus links to concepts of morality', Saunders's conclusion that 'vertical generality' is not an essential element of general principles of law seems consistent with the general regime on that source. By contrast, generality can also take the form of '*horizontal generality*, requiring representation in many legal systems, and which may encompass specific rules' (at 220; emphasis added).

However, by rejecting the role of abstraction of a principle as an element of its generality, the accuracy of Saunders's model might be jeopardized. While representativeness ('horizontal generality') may be regarded as a necessary and sufficient condition for establishing the generality of a principle, Saunders's conclusion risks discarding the potential relevance of that principle's importance ('vertical generality'), notably in terms of establishing whether that principle, as a general principle of law, is transposable to international law. Indeed, Saunders concludes that 'vertical generality is a consequence of (or a reason for) horizontal generality but is in itself not a requirement to found a General Principle'. But, if only 'horizontal generality' is required, to the exclusion of any other indicator of transposability, the risk of which Bin Cheng warned, to the effect that general principles of law be purely derived from a 'mathematical highest common factor of municipal law of all countries' (at 223), cannot be easily avoided.[27] Saunders anticipates this shortcoming, noting that Cheng postulated a form of 'vertical generality' purely based on a principle's content (at 224), yet this does not detract from the fact that verticality significantly overlaps with a general principle's transposability.

Discarding the role of abstraction as an aspect of generality also imperils the internal coherence of Saunders's model. Saunders considers the transposability of a principle as a matter of its 'appropriateness' to be a general principle of law: as Saunders observes, regarding Judge Bruno Simma's analysis of features determining the 'transferability of … a concept developed *in foro domestico*', those features pertain to the '*appropriateness*' of the respective general principle of law (at 156). Saunders appears to recognize the implications of the verticality of a principle in terms of its generality in other parts of the monograph: for instance, Saunders argues, insofar as 'the rule/principle distinction is not a dichotomy but a sliding scale', thus '[f]inding requisite horizontal generality between domestic laws will *necessarily require some level of vertical abstraction* – unless every law is identical in wording' (at 120–121, emphasis added).

Saunders's distinction between horizontal and vertical generality is largely reminiscent of the philosophical distinction between 'extension' and 'intension' – namely,

[26] Shlesinger, 'The Common Core of Legal Systems: An Emerging Subject of Comparative Study', in K.H. Nadelmann, A.T. von Mehren and J.N. Hazard (eds), *Twentieth Century Comparative and Conflicts Law: Legal Essays in Honor of Hessel E Yntema* (1961) 65, at 79 (cited at 221).

the quantity of entities designated by a concept, concretely embodying the properties making up that concept, and that concept's defining properties, as understood in the abstract, respectively. Insofar as intension and extension tend to be inversely proportional, with more properties typically implying less designated entities, the degree of 'abstraction' required of a general principle of law can be articulated more sensibly as its 'intension', without simply dismissing the role of 'verticality' or 'abstraction' in the categorical ways in which Saunders sometimes seems to suggest.[28]

3 Conclusion

To conclude, Saunders's analysis of scholarly and adjudicative discourses on general principles of law provides a principled, constructively critical, assessment of existing conceptions of that formal source. Furthermore, while Saunders's analytical framework could have been more coherently or effectively articulated (sometimes in important regards), Saunders makes a valuable contribution to elucidating the nature of general principles of law. Of paramount importance among those contributions, as discussed in this review, are Saunders's pleas for 'precision of terminology' as it relates to formal sources; greater use of general principles of law; avoidance of undue reliance on general principles of law, notably to assert norms purely on grounds of their desirable content; and the adoption of an approach to their ascertainment that is more representative of the world's legal traditions in aggregate.

Diego Mejía-Lemos

School of Law, Xi'an Jiaotong University, China
Email: d.ml@nyu.edu

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[27] Cheng, 'Comments', in H.C. Gutteridge, 'The Meaning and Scope of Article 38(1)(c) of the Statute of the International Court of Justice', 38 *Transactions of the Grotius Society* (1952) 125, at 130 (cited at 223).

[28] Mejía-Lemos, 'The Concept of 'Essence' and Its Uses in the Identification and Application of Customary International Law by International Criminal Courts and Tribunals', 21(6) *International Criminal Law Review* (2021) 1064, at 1100–1102.